

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Preemption of State and Local Zoning and
Land Use Restrictions on the Siting,
Placement and Construction of Broadcast
Station Transmission Facilities

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MM Docket No. 97-182

To: The Commission

**JOINT REPLY COMMENTS OF THE
NAMED STATE BROADCASTER ASSOCIATIONS**

Richard R. Zaragoza
David D. Oxenford

Their Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851
(202) 659-3494

Dated: December 1, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Summary

The named State Broadcaster Associations are pleased to continue their participation in this very important proceeding. In Joint Comments filed on October 30, 1997, some twenty-four state broadcaster associations expressed their support for the proposed Rule, with certain changes, which would enable broadcasters to comply with the Commission's proposed time line for the roll-out of Digital Television ("DTV"). That support is reaffirmed in these joint reply comments. It is the opinion of these Associations that the swift conversion to DTV is in the best interest of the public and that state and local regulatory processes could create an obstacle to the timely implementation of DTV service. A Rule is needed to ensure a timely conversion to DTV and to ensure fairness of decision making at the local level. In addition, the Rule would alleviate the predicament of other broadcasters who suffer from unnecessary delays and unreasonable denials of tower construction applications. This problem has persisted for years, hindering the attempts of AM, FM, and television broadcasters to upgrade their services in the public interest. The DTV Orders have merely added to the urgency of the situation.

There are many areas of agreement in the comments filed in this proceeding. There is a strong national consensus that a rapid move towards DTV will prove beneficial and that a timely implementation is essential. Furthermore, a number commenters expressed their support for the proposition that tower siting decisions should be fair, predictable, and expeditious. The primary areas of disagreement center around the scope of regulation by the local authorities and the length of time allowed local governments to render a decision.

The proposed Rule is a good balance of federal and local interests. In addition to ensuring the timely availability of DTV services to the public, the proposed Rule ensures that the

health and safety of the public will be fully protected. Under the Rule, issues that are of a uniquely federal character will be addressed by federal agencies, while strictly local issues remain the subject of local control. The Rule will not compromise the health or safety of the public. It will, however, ensure that rational decisions are made in a timely fashion.

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Wisconsin Broadcasters Association (collectively, the “Associations”), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, 47 C.F.R. §§ 1.415, 1.419, hereby timely submit their joint reply comments in response to certain of the comments filed in the Commission’s Notice of Proposed Rule Making (“NPRM”).^{1/}

I. INTRODUCTION

1. The Associations appreciate the opportunity to respond to some of the issues raised in the comments filed by other individuals and organizations in this proceeding. As mentioned in their initial comments in this proceeding, the Associations have a direct interest in this matter since they represent entities regulated by the Commission, many of whom are faced with the need to move their transmitter sites or to modify their existing ones as a result of the Commission’s digital television (“DTV”) proceedings,^{2/} and for other reasons. Therefore, the Associations have the requisite interest to participate in this important proceeding.

2. The Associations remain supportive of the Commission’s decision to move rapidly towards a national system of free, over-the-air Digital Television (“DTV”) service to the public. The delivery of high-quality, free, over-the-air television service to all Americans is of critical importance. The Associations are committed to helping their members meet the challenge presented by this historic opportunity to add to the nation’s video landscape. Such an

^{1/} Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, Notice of Proposed Rule Making, (“NPRM”), MM Docket No. 97-182, FCC 97-296 (August 19, 1997).

^{2/} Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, FCC 97-116 (April 21, 1997) (“*Fifth Report and Order*”), 62 F.R. 26966 (May 16, 1997); Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, FCC 97-115 (April 21, 1997) (“*Sixth Report and Order*”), 62 FR 26684 (May 14, 1997).

enormous undertaking will require significant financial investments in facilities as well as creative solutions to the inevitable obstacles presented by the ambitious implementation schedule. As a result, the Associations remain convinced that the proposed Rule with the suggested modifications is an essential component in the DTV conversion process. In addition, the Rule would alleviate the predicament of other broadcasters who suffer from unnecessary delays and unreasonable denials of tower construction applications. This problem has persisted for years, hindering the attempts of AM, FM, and television broadcasters to upgrade their services in the public interest. The DTV Orders have merely added to the urgency of the situation.

II. DISCUSSION

A. The Preemption Rule is Necessary for the Timely and Successful Implementation of DTV

3. There is substantial support for the rapid implementation of DTV among the commenters in this proceeding. The broadcast industry expressed its support for a rapid DTV roll-out.^{3/} Likewise, many of the city and county governments and their representative associations expressed their enthusiasm for a rapid deployment of DTV.^{4/} There is a national

^{3/} See, e.g., *Comments of Ohio Educational Telecommunications* at 1 (“OET generally supports both the Commission’s proposals in this proceeding, and the underlying reason for them -- namely, the great importance not only of the shift to digital television transmissions, but also that the transition be made as universal as possible in the shortest time frame to insure the best service to the public with the least risk for the consumer.”); *Joint Comments of Paxson Communications Corporation, Cox Broadcasting, Inc., and Media General, Inc.* at 2 (“A rapid roll-out of DTV is essential to the creation and success of [the PCC] television network”); *Comments of the Association of Local Television Stations, Inc.* at 2 (“[R]apid development of digital television serves vital public interests.”)

^{4/} See, e.g., *Comments of the National League of Cities and the National Association of Telecommunications Officers and Advisors* at 4 (“The Commission should keep in mind
(continued...)”)

consensus that the move towards DTV will be beneficial to the country, as evidenced by statements from Congress,^{5/} the White House,^{6/} and the FCC.^{7/}

4. Despite this overwhelming support for the rapid deployment of DTV, the state and local regulatory processes pose a threat to the accomplishment of the Commission's timetable. The record thus far in this proceeding has provided numerous specific examples of

^{4/} (...continued)
that local governments and the citizens they represent certainly do not oppose -- and indeed support -- the goal of rapid deployment of digital television ("DTV") service, both because of the potential benefits it offers to the viewing public and because rapid deployment will speed the return of analog spectrum that in part will be devoted to public safety use."); *Comments of Concerned Communities and Organizations Consisting of the U.S. Conference of Mayors et. al.* at 4 ("Municipalities generally support HDTV due to the competition it will bring in video delivery and in freeing up spectrum for public safety purposes."); *Comments of the City of Chicago* at 5-6 ("It is to the City's benefit to bring HDTV to Chicago, both because of the potential benefit of the technology to millions of television viewers and because of the promised return of spectrum ..."); *Comments of the City of Philadelphia* at 9 ("The City has an interest in the rapid deployment of DTV, because of the possibility that the prompt return of frequencies would allow the Commission to reallocate those frequencies for public safety and other uses of value to the City.")

^{5/} "The economy will benefit from the new jobs created by manufacturing new digital television receivers. The television broadcasting industry stands on the threshold of a transformation that will assure that over-the-air broadcasting isn't relegated to the slow lane on the digital information superhighway." 143 Cong. Rec. H6456 (daily ed. May 6, 1997) (statement of Sen. McCain).

^{6/} "We also know that digital broadcasting will be more dynamic and more flexible; more competitive and more interactive -- and potentially much more responsive to the needs and interests of the American people, if we prepare for it in the right way." Remarks by Vice President Al Gore regarding the Presidential Advisory Committee on Public Interest Obligations for Digital TV, Wednesday, October 22, 1997.

^{7/} "I believe that Americans will benefit greatly from this advanced technology and the new services." Comments of Commissioner Susan Ness before Association of American Public Television Stations, Washington, D.C., April 14, 1997.

tower construction delays due to state and local regulations and processes.^{8/} This evidence convincingly shows that these processes often hinder broadcasters in their attempts to modify or construct broadcast facilities, and thus it is reasonable to assume that state and local regulations and processes will also be a significant threat to the success of the Commission's DTV implementation plan.

5. Some broadcasters have been able to complete tower modification and construction projects smoothly without any delays from local regulatory processes. The Associations applaud those local governmental authorities who have come together in a spirit of cooperation to work with broadcasters to benefit the public.^{9/} Despite these successes, however,

^{8/} *See Comments of Children's Broadcasting Corporation; Comments of Maranatha Broadcasting; Comments of KSKY; Comments of WVCH Communications, Inc.; Comments of Ronald E. Castro and Jack W. Fritz II, D.B.A. Results Radio of Sonoma, LP; Comments of McGraw-Hill Broadcasting Company, Inc.; Comments of Golden Orange Broadcasting Co., Inc.; Comments of Polnet Communications, LTD; Comments of Board of Regents of the University of Wisconsin System; Comments of The Cromwell Group, Inc.; Comments of Radio Property Ventures; Comments of Fant Broadcasting Co.; Comments of Cosmos Broadcasting Corporation; Comments of Ying Hua Bennis; Comments of Freedom Communications, Inc.; Comments of Champlain Valley Telecasting, Inc.; Comments of Butterfield Broadcasting and the Growing Christian Foundation; Comments of Richard L. Harvey; Comments of WJJA; Comments of Fordham University; Comments of Harry J. Pappas, Stella A. Pappas, and Skycom, Inc.; Comments of Norman Broadcasting Company, Inc.; Comments of Pillar of Fire; Comments of Silver King Broadcasting of Massachusetts, Inc.; Comments of Beaverkettle Company; Comments of Florida Sportstalk, Inc.; Comments of Sima Birach; Comments of WFTC(TV), Minneapolis, Minnesota; Comments of New Mexico Broadcasting Company; Comments of Gary Schmedding, President, Broadcast Group, Lee Enterprises, Incorporated; Comments of Sounds of Service Radio Inc.; and Comments of Goetz Broadcasting Corporation; Comments of Communications Facilities, Inc.; Comments of Association of America's Public Television Stations and the Public Broadcasting Service; Comments of Clear Channel Television; Joint Comments of the North Carolina and Virginia Associations of Broadcasters; Comments of New Jersey Broadcasters Association; and Joint Comments of the 24 Named State Broadcaster Associations.*

^{9/} *See e.g., Comments of the Phoenix Parks and Recreation Board, City of Phoenix,*
(continued...)

there remain numerous opportunities for undue delay and inconsistent decision making. A federal rule is needed to ensure that fair and swift procedures will be consistently followed at all locations. The proposed Rule would ensure that no member of the public will be denied the benefits of DTV due to an unreasonable obstruction by a local authority.

6. There is a substantial body of agreement between the parties to this proceeding. As has been shown, there is substantial agreement that DTV will prove beneficial and that a timely implementation is essential. Furthermore, a number of local jurisdictions expressed their support for the proposition that tower siting decisions should be fair, predictable, and expeditious.^{10/} There has been support from the state and local governments for an arbitration process,^{11/} and even in some cases broad preemptive power.^{12/} The primary areas of

^{9/} (...continued)

Arizona, at 3 (“Our relationship with the broadcasters, while obviously not without occasional problems, has been marked by a professional, businesslike relationship, with all parties understanding the respective interests of the other and demonstrating a willingness to meet those needs wherever possible.”)

^{10/} See e.g., *Comments of the Brookings County Zoning Administrator, Brookings County, South Dakota*, at 1 (“We agree that local zoning officials should expedite requests in a timely and professional manner.”); *Comments of the City of Rocky Mount, North Carolina*, at 1 (“... we intend to ensure stability, predictability, and consistency over time as staff, appointed citizens, and elected officials change.”); *Comments of the County of Los Angeles*, at 2 (“... this jurisdiction has initiated modified procedures to streamline the process”).

^{11/} See e.g., *Comments of the Addison County Regional Planning Commission, Middlebury, Vermont*, at 2 (“We applaud your proposed use of alternative dispute resolution.”); *Comments of the County of Cassia, Idaho*, at 2 (“We believe that an appropriate role for the Commission in resolving disputes between localities and licensees would be that of a mediator, because of the additional expertise held by the Federal Communications Commission in these issues.”); *Comments of the City of Seattle, Washington*, at 3 (“The concept of alternative dispute resolution has merit.”).

^{12/} See e.g., *Comments of King County Department of Development and Environmental Services, Renton, Washington*, at 1-2 (“If a jurisdiction is unable to complete a permit

disagreement appear to be which topics of regulation should be appropriately addressed by the local authorities and how much time should be allowed local governments to render a decision.

B. The Proposed Rule is a Measured, But Necessary Response to this Need

1. The Commission has Authority to Promulgate this Rule

7. The Commission has the broad authority to preempt non-federal regulations that frustrate the achievement of objectives within its authority. The Communications Act of 1934, as amended, grants the FCC exclusive jurisdiction over broadcast matters.^{13/} The Commission has a congressional mandate to make an efficient, nation-wide communication service available to all the people of the United States.^{14/} The Commission has already interpreted this mandate to include the swift conversion to DTV.^{15/} Since the Commission is acting within its delegated authority, and state and local tower siting and construction regulations pose an obstacle to the rapid conversion to DTV, a federal preemption rule is a legitimate exercise of the Commission's authority.

2. The Proposed Rule Adequately Protects Interests of Health Safety

8. The United States has a collective interest in the rapid conversion to DTV. The health and vitality of free over-the-air television is critical to the citizens of the country. Without a widespread conversion to DTV, the success of this endeavor will be in jeopardy. For DTV to

^{12/} (...continued)
within this timeframe, we would fully support FCC authority to pre-empt the local process and establish land-use conditions for that permit.”).

^{13/} See e.g., 47 U.S.C. §§ 152(a), 301, 303(c), (d), (e) and (f); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963).

^{14/} See e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694 (1984).

^{15/} *Fifth Report and Order* and *Sixth Report and Order*, supra note 2.

be a success, several factors must occur simultaneously: broadcasters must make available DTV programming, electronics manufacturers must offer reasonably priced DTV receivers, and consumers must purchase the new equipment. In order to provide the proper incentives for all of these pieces to fall in place, a nationwide coordinated move to the new system is essential. Thus there is a compelling federal interest to move the entire country forward according to the established timetable.

9. There is no dispute that state and local authorities have an important role to play in protecting the health and safety of the citizens in their jurisdictions. The local governments in this proceeding have expressed concern that tower construction projects might expose citizens to excessive RF radiation emissions,^{16/} might pose a threat to aviation safety,^{17/} might be structurally unsafe,^{18/} and might endanger the surrounding environment.^{19/} All of these legitimate health and safety objectives will still be safeguarded under the proposed Rule.

a. RF Radiation

10. All proposed communications tower operations must be shown to comply with the Commission's RF radiation safety studies before approval is given. The Commission's RF radiation emission standards have been developed over the years to ensure that tower operations do not pose a threat to local communities, and thus local communities are adequately protected. Several local authorities recognized that the Commission's RF radiation regulations are sufficient

^{16/} See e.g., *Comments of the Parish of Jefferson, State of Louisiana*, at 9-11.

^{17/} See e.g., *Comments of the City of Quincy, Illinois*, at 1.

^{18/} See e.g., *Comments of the City of Dallas, Texas and Cedar Hill, Texas* at 25-26.

^{19/} See e.g., *Comments of the State of Vermont, Agency of Commerce and Community Development*, at 1-2.

and have expressed support for a Rule permitting preemption of state and local RF radiation laws.^{20/} Any additional RF radiation regulation by state & local authorities would not only be wastefully duplicative of the Commission's efforts, but it would create the prospect of a patchwork quilt of inconsistent RF radiation standards that would unduly burden the industry as well as delay the implementation of DTV.

b. Aviation Safety

11. The proposed Rule does not attempt a blanket preemption of all aviation safety issues, but only those related to tower painting, marking, and lighting issues. In the current scheme, the FAA and the Commission work together to ensure that a consistent set of painting, marking and lighting regulations apply to all towers. The Commission takes an aggressive role in ensuring that broadcasters comply with these rules.^{21/} Any attempt by local authorities to

^{20/} See e.g., *Comments of Latah County, Idaho*, at 1 ("Latah County strongly agrees with the preemption of state and local laws and regulations to the extent that said preemption would prohibit the denial of a request to place, construct, or modify a broadcast antenna on the basis of the environmental or health effects of radio frequency emissions to the extent that such facility has been determined to comply with the Commission's regulations and/or policies concerning such emissions. This is because local zoning authorities in a jurisdiction such as ours are citizens elected or appointed to exercise zoning authority on a part-time basis. As such, they have neither the time or the expertise to make well informed decisions with regard to the effects of radio frequency emissions, and it only makes sense that we should be able to rely on the technical expertise of the Commission, in consultation with ANSI, the EPA, and other federal agencies to make well-researched decisions with regard to this issue."); *Comments of the City of College Park, Georgia*, at 1 ("With respect to the preemption issues, [the City of College Park] is not concerned by preemption by the FCC over environmental or health effects of radio frequency emissions ..."); *Comments of the City and County of Honolulu, Hawaii*, at 1 ("We do not object to preemption of regulations based on radio frequency (RF) emissions, provided that the broadcasting facilities comply with applicable Federal Communications Commission (FCC) policies and requirements with regard to such emissions.")

^{21/} See e.g., *Air Hazards Caused by Improperly Marked & Lighted Communications Towers*, Pub. Not. 80411, November 13, 1997.

regulate in these items would disturb the uniformity imposed by the current system, and would actually work against the interests of aviation safety. A number of local authorities have acknowledged the wisdom of preemption in this area.^{22/}

12. The interest in ensuring that broadcast towers do not pose a threat to aviation safety is fully recognized under the proposed Rule. There is currently a system in place in which the Federal Aviation Administration (“FAA”) and the FCC cooperate to ensure that proposed towers do not threaten aviation safety. When broadcasters consider constructing a new tower, they generally first hire a consultant to assess the suitability of a proposed site including any aviation safety issues. Then the broadcaster will contact the FAA for approval of the proposed location, followed by a filing with the FCC. After a proposed tower clears all of these hurdles broadcasters typically approach local authorities for permission to construct the tower.

13. While the FAA technically does not have the authority to stop tower construction projects, the FCC does. The FCC has a longstanding practice of deferring to the FAA on tower safety issues, and towers that are deemed an aviation hazard by the FAA do not receive Commission approval. The proposed Rule recognizes this collaborative approach that currently works to ensure aviation safety. It also permits the state and local authorities to examine aviation

^{22/} See e.g., *Comments of Latah County, Idaho*, at 2 (“Latah County agrees with the preemption of state and local laws and regulations to the extent that said preemption would prohibit the denial of a request to place, construct, or modify a broadcast antenna on the basis of lighting, painting, and marking requirements, to the extent that the facility has been determined by the Federal Aviation Administration (FAA) or the Commission to comply with applicable FAA and Commission regulations and/or policies regarding tower lighting, painting, and marking.”); *Comments of the Borough of Baldwin, Pennsylvania, et al*, at 5 (“Some issues in the Notice involve areas in which the Commission already has the ability to act including ... Commission and FAA requirements as to lighting and marking requirements. Those issues recognize the essential nature of the federal system ...”); *Comments of the City of College Park, Georgia*, at 1-2 (“Likewise, lighting, painting and marking requirements which are required by either the FAA or the FCC are not at issue.”);

safety concerns with regard to proposed towers provided they do so in a timely fashion.

Therefore the proposed rule will not have an adverse effect on aviation safety.

c. Engineering safety

14. There is also a legitimate concern that broadcast towers are built in compliance with safe engineering standards. However, the proposed Rule does not compromise safety. Engineering safety concerns such as fall zone radius requirements, construction safety standards, building safety codes, geological suitability studies, and location checks for nearby power lines, pipes, and tunnels can be addressed by local authorities. The proposed rule does not seek to remove the local governmental authorities from their role in protecting the safety of their citizens, but rather improves the fairness, consistency, and timeliness of these regulatory processes. Local authorities should not be permitted to use this as a catch-all category to delay or deny tower proposals that comply with sound engineering principles. Engineering safety regulations are already in place in most jurisdictions, and decisions can quickly be made as to whether a proposed tower is in compliance. Thus state and local authorities can still decide whether a proposed tower will be safe within the time deadlines of the proposed Rule. Furthermore, when preemption decisions are made pursuant to the Rule, the local authorities who believe a tower proposal to be unsafe will have an adequate opportunity to make their case before an impartial tribunal in a timely fashion.

d. Environmental Concerns

15. Finally, while environmental issues can be a legitimate concern, the Commission already requires an environmental assessment when proposed towers would be located within wildlife preserves, wetlands, historical sites, and other such environmentally sensitive areas. This environmental analysis should adequately protect environmentally sensitive locations, and

any additional legitimate environmental concerns can be raised by local authorities within the time deadlines designated in the proposed Rule.

16. The proposed Rule does not mention local regulation based on aesthetics. Presumably under the Rule local authorities could still deny tower modification or construction proposals on the basis of aesthetics, however aesthetic considerations should not be permitted to be used as a catch-all category for local groups opposed to towers who cannot find any “legitimate” basis to deny tower construction applications. Such groups typically want to receive the benefits of broadcast services, but exhibit a “not in my back yard” attitude towards tower placement. If vague and subjective rationales such as aesthetics are permitted to prevent broadcasters from moving ahead with tower modifications and construction plans, there is an increased probability that the DTV roll-out will not be accomplished on schedule. Therefore, claims of “aesthetics” should not be permitted to thwart the important federal interest of maintaining a high-quality national broadcasting system.

17. In summary, the proposed Rule reflects a careful balancing of the federal interest in moving forward with a coordinated DTV implementation effort in a timely fashion and the local interests of protecting the health and safety of citizens. Issues that are of a uniquely federal character will be addressed by federal agencies, while strictly local issues remain the subject of local control. The Rule will not threaten the health or safety of the citizens, but will merely ensure that rational decisions are made in a timely fashion.

III. CONCLUSION

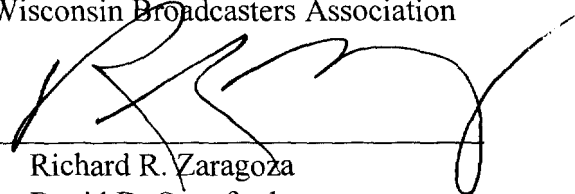
Based on the foregoing, the Associations respectfully urge the Commission to adopt the proposed Rule with the modifications set forth herein.

Respectfully submitted,

The Arizona Broadcasters Association
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The Wisconsin Broadcasters Association

Fisher Wayland Cooper Leader
& Zaragoza L.L.P.
2001 Pennsylvania Ave., N.W., #400
Washington, D.C. 20006-1851
(202) 659-3494

By:


Richard R. Zaragoza
David D. Oxenford

Their Attorneys

Dated: December 1, 1997